DATUK M KAYVEAS

v.

PV DAS

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
MAHADEV SHANKAR JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: N-02-435-1996]
16 JULY 1997

CIVIL PROCEDURE: *Appeal - Leave to appeal - Stay - Whether application for stay to be made in High Court or Court of Appeal*

CIVIL PROCEDURE: *Injunction - Interim injunction - Whether interim injunction obtained by respondent on an ex parte or inter partes application - If ex parte whether appealable*

The plaintiff/respondent had obtained an interim injunction against the defendant/appellant from holding himself out as a member or the President of the PPP and from carrying out any party activities. Subsequently, the defendant filed a notice of appeal and several days later filed a notice of motion together with an affidavit in support, and a certificate of urgency, praying for an order to stay the interim injunction of the plaintiff. An interim order was granted by the President of the Court of Appeal in terms of the defendant's third prayer, that was to stay the interim injunction till the final disposal of the appeal. The plaintiff was not given notice of the motion, nor was the defendant's motion served on him, and it was through the press that he knew of the interim order. The plaintiff then filed a notice of motion and it was fixed to be heard at the same time as the defendant's Motion. The only concern that the instant court was faced with was whether the interim order should be set aside.

Held:
Per Mahadev Shankar JCA:

[1] By O. 19 r. 1(2B) of the Rules of the High Court 1980 ('the RHC'), an interim injunction obtained on an *ex parte* application automatically lapses at the end of two weeks. Injunctions to stop meetings cannot be granted on *ex parte* applications. The proper remedy in the High Court for a party aggrieved by an order made *ex parte* in his absence is **not** to appeal but to apply to have it set aside by the judge who made it.

[2] An *ex parte* motion for an injunction is where the respondent is present at the hearing, at the express or tacit invitation of the applicant, in order to assist. An *ex parte* hearing of an *inter partes* motion or application is where a party duly served fails to appear at the hearing. An application so heard in the absence of a party is **not** an *ex parte* application. The interim injunction of the plaintiff in the instant case was not obtained on an *ex parte* application.

[3] Under O. 32 r. 3 of the RHC, the service of a summons only requires two clear days' notice. By O. 32 r. 13(2)(a), the affidavit in support of the summons must be served within 14 days of filing. The plaintiff's summons had fulfilled the requirements and at the High Court proceedings the defendant was also present. The injunction thus granted did not breach O. 29 r. 1(2)(c).

[4] An *inter partes* motion praying for an interim order has to be duly served and notice of it given before the order can be obtained. The interim order of the appellant/defendant was made in the absence of the respondent and as no notice had been given it was not regularly obtained.

[Interim order set aside; no order made on appellant's motion.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Rayuan - Kebenaran untuk memohon bagi mendapatkan penggantungan - Samada permohonan untuk penggantungan dibuat dalam Mahkamah Tinggi atau Mahkamah Rayuan*

PROSEDUR SIVIL: *Injunksi - Samada injunksi interim yang diperolehi oleh responden adalah permohonan secara ex parte atau inter parties - Jika secara ex parte samada ianya boleh dirayui*

Plaintif/responden telah memperolehi satu injunksi interim terhadap defendan/perayu daripada mengemukakan dirinya sebagai seorang ahli atau Presiden bagi parti tersebut atau menjalankan sebarang aktiviti parti. Defendan telah memfailkan satu Notis Rayuan dan beberapa hari kemudiannya telah memfailkan Notis Usul, satu afidavit sokongan dan Perakuan Kesegeraan, memohon satu perintah untuk menggantung injunksi interim plaintif tersebut. Perintah interim telah diberikan oleh presiden Mahkamah Rayuan sepertimana yang telah dipohon oleh pohonan ketiga defendan iaitu untuk menggantungkan injunksi interim tersebut sehingga penyelesaian muktamad rayuan tersebut. Plaintif telah tidak diberikan notis dan usul defendan telah tidak disampaikan ke atasnya dan beliau mengetahui mengenai perintah interim itu melalui akhbar. Plaintif kemudiannya telah memfailkan satu Notis Usul dan ianya telah ditetapkan untuk didengar pada masa yang sama seperti usul defendan. Satu-

satunya urusan yang dihadapi oleh mahkamah adalah samada perintan interim itu seharusnya diketepikan.

Diputuskan:
Oleh Mahadev Shankar HMR:

[1] Menurut A. 19 k. 1(2B) Kaedah-kaedah Mahkamah Tinggi 1980 (KMT) sesuatu injunksi interim yang diperolehi atas permohonan *ex parte* secara otomatik luput selepas tempoh masa dua minggu. Remedi yang wajar dalam Mahkamah Tinggi bagi sesuatu pihak yang terkilan oleh suatu perintah yang dibuat secara *ex parte* dalam ketidak-hadirannya bukannya untuk merayu tetapi untuk memohon supaya ianya diketepikan oleh hakim yang telah membuatnya.

[2] Usul *ex parte* untuk suatu injunksi adalah di mana responden hadir di perbicaraan atas jemputan nyata pemohon agar dapat membantu dan perbicaraan *ex parte* akan sesuatu usul atau permohonan *inter parties* adalah di mana sesuatu pihak yang telah disampaikan itu gagal untuk hadir di perbicaraan. Sesuatu permohonan yang didengar sedemikian rupa dalam ketidak-hadiran sesuatu pihak bukannya merupakan permohonan *ex parte.* Injunksi interim plaintif telah tidak diperolehi atas suatu permohonan *ex parte.*

[3] Di bawah A. 32 k. 3 KMT, penyampaian saman hanya memerlukan dua hari nyata notis. Melalui A. 32 k. 13(2)(a) afidavit sokongan saman tersebut mestilah disampaikan dalam tempoh 14 hari dari pemfailan. Saman plaintif telah memenuhi kehendak-kehendak itu dan di prosiding Mahkamah Tinggi defendan telah juga hadir. Injunksi yang telah diberikan dengan itu tidak memungkiri A. 29 k. 1(2)(c).

[4] Sesuatu usul *inter parties* yang memohon untuk mendapatkan perintah interim haruslah disampaikan terdahulu dan notis mengenainya diberikan sebelum perintah boleh diperolehi. Perintah interim perayu/defendan telah dibuat dalam ketidak-hadiran responden dan oleh kerana tiada notis yang telah diberikan maka ianya telah tidak diperolehi menurut aturan.

[Perintah interim diketepikan; tiada perintah dibuat ke atas usul perayu.]

Cases referred to:

Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors & Anor [1972] 3 All ER 384 ***(refd)***

United Overseas Bank Ltd v. Chung Khiaw Bank Ltd [1968] 2 MLJ ***(aff)***

United Malayan Banking Corporation Bhd v. Syarikat Perumahan Lunas Sdn Bhd [1968] 1 MLJ 546 ***(cit)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 27(3), 43, 49, 67
Rules of the Court of Appeal 1994, rr. 13, 14
Rules of the High Court 1980, O. 13 r. 8, O. 14 r. 11, O. 19 r. 9, O. 29 r. 1(2C) O. 32 rr. 3, 6, 13(2)(a), (b), O. 35 rr. 2, 3
Societies Act 1966, s. 18(c)

[Appeal from High Court Malaya, Seremban; Suit No: 22-72-1996]

For the appellant - DP Nabhan (N Mohanadas & PC Low with him); M/s Blanche Kayveas & Co
For the respondent - Tun Salleh Abas; M/s Rugber Singh & Partners

JUDGMENT

Mahadev Shankar JCA:

On 1 August 1996 the respondent/plaintiff (Das) filed a writ of summons and a statement of claim in the High Court at Seremban praying for an order that he be declared the lawful President of the Peoples' Progressive Party of Malaysia (the party) and that the recognition accorded by the Registrar of Societies to the appellant/defendant (Kayveas) as President, and his colleagues as office bearers of the party, be quashed and for an injunction that Kayveas be restrained from holding himself out as the President of the party or from carrying out a number of other designated activities (party activities) on behalf of the party.

The same day Das filed a summons in chambers for an interim injunction supported by an affidavit. This summons in chambers was originally headed, "SAMAN DALAM KAMAR EX-PARTE". However before it was served the word "EX" was deleted and substituted with the word "INTER". The writ, statement of claim, Saman Dalam Kamar Inter Parte, and the affidavit in support were all served on Kayveas on 5 August 1996. The return date of the summons was 15 August 1996. Kayveas signed for those cause papers himself, and endorsed the service copies, "Received without prejudice."

Kayveas avers that on 8 August 1996 he entered a conditional appearance to the writ.

On 15 August 1996 Das and Kayveas both appeared before the judge. Das's solicitor Encik Rugber Singh and his counsel Tun Salleh Abas were also present. Encik PC Low was present as Kayveas's counsel.

Kayveas's counsel objected to the summons being heard claiming he was entitled to 14 days to file an affidavit in reply to Das's affidavit. The judge promptly gave Kayveas up to 29 August 1996 to file his affidavit in reply.

Kayveas's counsel then referred to s. 18(c) of the Societies Act 1966 (the Act) and submitted that under O. 29 r. 1(2C) of the Rules of the High Court 1980 (RHC) an interim injunction on an *ex parte* application to stop the holding of a meeting of a society cannot be granted.

The judge's note as to what Kayveas and Tun Salleh said next reads:

> If Court mindful of giving interim order I ask for a short adjournment to file my affidavit in reply so that this case may be heard *inter parte.*
>
> I undertake not to do anything personally to jeopardise the position of the plaintiff.
>
> Peguam plaintiff undertaking defendan tidak mencukupi dan memohon perintah interim sementara menunggu keputusan permohonan ini.
>
> Peguam defendan (Kayveas) undertaking subject to me filing affidavit in reply and this application be heard to-day and as plaintiff requires time to file reply, I opt to file within two weeks.
>
> Peguam plaintif irreparable damage jika order interim tidak dibenarkan.

Because Counsel for Das insisted on an interim injunction arguments followed on whether it should be granted. What was specifically in issue was whether the Party's Annual General Assembly fixed for 3 September 1996 should be permitted to proceed. Kayveas had with him two affidavits he had affirmed in opposition. Kayveas would not **file** them in court then and there. He nevertheless handed over copies of the same to Das's solicitors.

The balance of convenience was then fully argued and the decision made by the judge the same afternoon reads as follows:

> Keputusan:
>
> Defendan telah diendorse sebagai President and AJK di EDC pada 19 Mac 1995 terdiri dari AJK yang dipilih pada 10 Oktober 1993. Plaintif telah dipilih sebagai President AJK di TDC pada 13 Ogos 1995 di Segamat.
>
> TDC hendaklah diadakan tiga tahun sekali pada 1988, 1991, 1994 dan 1997 tapi tiada TDC diadakan pada 1991 atau 1994. Ia dikatakan diadakan pada 1995. Ini menimbulkan persoalan yang serious sama ada EDC pada 19 Mac 1995 yang mengendorse pemilihan defendan sah atau tidak.
>
> Defendan akan mengadakan mesyuarat TDC pada 3 September 1996 dan semasa itu isu yang dipertikaikan di atas belum diputuskan. TDC ini jika diadakan akan merumitkan keadaan dua atau tiga pihak yang bertikai. Atas keseimbangan keselesaan balance of convenience interim order patut di benarkan.

Mahkamah beri interim order sebagai dipohon kecuali prayer (iii) sehingga penyelesaian permohonan ini.

The injunction granted by the court (the said injunction) forbade Kayveas from holding himself out as a member or as President of the party or carrying out any party activities until the application made in the summons in chambers had been disposed of. The draft order was approved by Kayveas's solicitors. *Inter alia* it forbade Kayveas from advertising himself as a member or President of the party or using his authority to hold any meeting of the party. Clearly this was directed at the General Meeting Kayveas proposed to hold on 3 September 1996 because the implications of that meeting were ventilated in the arguments.

If the time table set by the court at the request of both parties had been followed Kayveas should have filed his affidavit in opposition on or before 29 August, Das his affidavit in reply within 14 days therefrom, and a hearing would have taken place thereafter before the trial judge to determine whether the said injunction should continue until the trial of the action.

Instead of allowing this time table to take its course, Kayveas filed a Notice of Appeal on 16 August 1996. At 3.14 pm on 21 August 1996 Blanche Kayveas & Co. (Kayveas's solicitors) filed a letter dated 20 August 1996 in the Court of Appeal Registry (the Registry). The letter was addressed to YAA the President. It referred to a Notice of Motion and affidavit filed on 20 August 1996. No such motion and affidavit had been filed on 20 August 1996. In fact the motion (Kayveas's motion) and his affidavit in support and a Certificate of Urgency were all dated and filed on 21 August 1996. Kayveas's motion prayed for the following orders:

(i) An order to stay the interim injunction made by the trial judge on 15 August 1996;

(ii) An order that the hearing of this motion *inter partes* in the Court of Appeal be stayed pending Kayveas being given 14 days to file a further affidavit;

(iii) An interim order that the interim injunction of 15 August 1996 be stayed till the final disposal of this appeal;

(iv) Costs be costs in the cause;

(v) Damages special, general and exemplary be assessed by the Registrar of the High Court at Seremban and paid to Kayveas;

(vi) Such further relief as may be thought just.

The very next day (ie, 22 August 1996) Kayveas obtained an interim from the President of the Court of Appeal in terms of his third prayer (the said interim order). Kayveas's motion was fixed for hearing *inter partes* on 16 September 1996.

Although by rr. 13 and 14 of the Rules of the Court of Appeal 1994 (the Rules) order and s. 43 (as amended) of the Courts of Judicature Act 1964 any application for stay should have been made in the first instance to the High Court, no such application was made. Nor does Kayveas's supporting affidavit give any reason for this omission.

Furthermore Kayveas's motion did not state that any application was being made *ex parte*. As appears from the material now before this court no notice was given by Kayveas's solicitors to Das or his solicitors until 6 September 1996 that this motion had been filed or that the said interim order had been obtained.

In breach of his undertaking given in the High Court and the terms of the said injunction, Kayveas held a press conference and was reported by the New Straits Times of 30 August 1996 as having said that he had obtained the said interim order on 22 August and proposed to proceed with the General Assembly on 3 September 1996.

It is from this press report that Das learnt of the said interim order. The 31 August was a public holiday, and 1 September was a Sunday.

After inspecting the court file to discover what had really happened, Das filed his motion (Das's motion) on 3 September 1996. The first prayer in Das's motion is that it be heard *ex parte* on the basis of urgency and in the interest of justice. In this he did not succeed. The Registry fixed his motion for hearing *inter partes* only on 16 September 1996. Thus the very event which the said injunction was designed to prevent became a *Fait Accompli.*

So on 16 September 1996 we heard both Kayveas's motion and Das's motion together.

Counsel for Kayveas, Mr. Nabhan submitted that the said injunction in the High Court was an *ex parte* order but it was nevertheless appealable! There are serious procedural implications here. By O. 29 r. 1(2B) of the RHC 1980 an interim injunction obtained on *ex parte* **application** automatically lapses at the end of two weeks, and injunctions to stop meetings cannot be granted on *ex parte* applications. Notwithstanding s. 67 of the Courts of Judicature Act 1964 the proper remedy in the High Court for a party aggrieved by an order made *ex parte* in his absence is not to appeal but to apply to have it set aside by the judge who made it. (See O. 13 r. 8, O. 14 r. 11, O. 19 r. 9,

O. 32 r. 6 and O. 35 r. 2 of the RHC 1980 read with r. 14 of the Court of Appeal Rules).

Mr. Nabhan referred us to *Pickwick International Inc. (GB) Ltd. v. Multiple Sound Distributors Ltd. and Anor* [1972] 3 All ER 384 to contend that even though Kayveas was present at the hearing on 15 August and took part in the hearing the application remained an *ex parte* application – albeit an opposed *ex parte* application.

There is a world of difference between an *ex parte* motion for an injunction where the respondent is present at the hearing, at the express or tacit invitation of the applicant, in order to assist (as in *Pickwick International Inc. (GB) Ltd. v. Multiple Sound Distributors Ltd. and Anor*) and an *ex parte* hearing of an *inter partes* motion or application where a party duly served fails to appear at the hearing; see the decision of the Federal Court in *United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd.* [1968] 2 MLJ where the first ratio in the headnote reads:

> **Held,** allowing the appeal: **(1) a judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application**. It is the hearing which is *ex parte* and an order made on such hearing is an *ex parte* order within the terms of O. LIII r. 4(1).

This was followed by YA Edgar Joseph Jr in *United Malayan Banking Corporation Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd.* [1968] 1 MLJ 546.

The summons in chambers which resulted in the said injunction was duly served on 5 August 1996 because O. 32 r. 3 of the RHC 1980 only required two clear days notice. Order 32 r. 13(2)(a) of RHC was fulfilled because Das's affidavit in support was served **within** 14 days of the filing on 2 August 1996. It is arguable whether O. 32 r. 13(2)(b) means that in any event Kayveas had 14 days from 5 August to file his reply. The rule says he must file it within 14 days. This leaves it open to contention that if there is to be an earlier hearing Kayveas had to file his affidavit earlier or get the summons adjourned. Since Kayveas was duly served **AND** took part in the High Court proceedings it was not open to him to criticise the said injunction as having been granted in breach of O. 29 r. 1(2C) of the RHC 1980.

Briefly Tun Salleh's criticisms of the conduct of Kayveas and his solicitors in the Court of Appeal are as follows:

(i) The said injunction was made after Kayveas gave the High Court an undertaking that he would do nothing to prejudice Das's position. He breached that undertaking;

(ii) Kayveas got an extension of time from the trial judge to file the affidavits he had in hand on 15 August, thereby leading both the High Court and Das's solicitors to believe that Kayveas intended that a further hearing also *inter partes* would be held to determine if the said injunction shall continue. By failing to file the affidavits and applying to the Court of Appeal for an *ex parte* order he misled the court and Das;

(iii) If he intended to obtain a stay he should have applied to the trial judge after giving notice to Das. He did not;

(iv) **Only applications for leave to give shorter notice** of motion of less than 7 days can be made by motion *ex parte*. On its face, Kayveas's motion was an *inter parte* motion. By failing to give prior notice of his application for the said interim order in the Court of Appeal, Kayveas breached r. 49 which read with r. 27(3) made it incumbent upon Kayveas to give notice to Das;

(v) Kayveas's prayers to suspend the hearing of his motion *inter partes* for 14 days was deliberately done to facilitate the holding of the General Meeting of 3 September in defiance of his own earlier undertaking to the trial judge. It was submitted that the total omission of Kayveas to file any further affidavit or timeously to notify Das that he had got the order and his omission to serve the cause papers until 6 September 1996 was a calculated deception of all parties concerned.

These are serious criticisms. They were not rebutted. All Mr. Nabhan could say was that the said injunction could not be justitifed because it was made in violation of O. 29 r. 1(2C) of the RHC 1980 and s. 18(c) of the Societies Act. We have already touched on O. 29 r. 1(2C). As for s. 18(c) of the Act the issue was whether Kayveas was authorised to act at all, and as for Kayveas's complaint that he was not given a reasonable opportunity of being heard in the High Court, the record indicates otherwise. It was on the strength of Kayveas's undertaking and his request for an extension of 14 days to file the affidavits he already had with him, that the hearing was adjourned and an injunction made to preserve the *status quo* in the High Court.

The manner in which Kayveas's solicitors by-passed the procedural safeguards in the Court of Appeal is deeply disturbing. An inspection of the Court file shows that the covering letter written by Kayveas's solicitors to the Registrar of 21 August 1996 filing his cause papers (see encl. 5) **purports** to have been copied to Das's solicitors. The relevant endorsement reads:

Lamp.

sk. Responden dan/atau Peguamcaranya
Tetuan Rugber Singh & Partners
Peguambela & Peguamcara
No. 25-1, (Tingkat Atas)
Jalan Majili
84000 Muar
Johor Darul Takzim.

This could have given the Registry and YAA the President the impression that the required notice had been given. Why was this letter not immediately served with the enlosures or faxed to Das's solicitors? Why was service of the cause papers and the interim order delayed until 6 September 1996?

All Mr. Nabhan was able to say to us about these lapses is that the practice adopted by Kayveas's solicitors could have been better. He frankly conceded they only notified Das's solicitors of the steps that they had taken after the damage was done.

In the result, we were faced with an anomalous situation. Kayveas's motion was an *inter partes* motion which had not been duly served and no notice thereof had been given before the said interim order was obtained. That interim order purported to be an *ex parte* order made in the absence of the respondent. As no prior notice had been given it was not regularly obtained. However even though Kayveas's motion was fixed for hearing on 16 September, the said interim order extracted by Kayveas' solicitors on 28 August 1996 was conditioned to be effective until the final disposal of the appeal. In effect therefore Kayveas had purportedly obtained *ex parte* all the relief he prayed for before the *inter partes* hearing of his motion. Thus the only useful order we could make on these two motions was that the said interim order be set aside as prayed for by Das. So we made no order on Kayveas's motion, but ordered that the costs in respect of both motions be taxed and paid by Kayveas to Das.

The uninitiated may well be pardoned for thinking that what has happened so far in this case is only yet another example of Newton's third law of motion that to every action there is an equal and opposite reaction. If all Kayveas says about Das is true, the statement of claim and the interim injunction sought by Das was really a most mischievous attempt to derail not only Kayveas and his committee but also the electoral process scheduled for 3 September 1996. And Kayveas's allegations are ostensibly supported by a powerful body of collateral testimony. But then if what Das says about Kayveas is true, Kayveas is an imposter who has no right to claim even the status of an ordinary

member of the party let alone the Presidency. The High Court judge was not directly concerned with the merits of the case but with the balance of convenience and whether there was a serious question to be tried. Our only concern was whether the said interim order should be set aside. The larger issues incidental to Tun Salleh's complaints aforesaid must therefore be the subject of further determination if the combatants cannot resolve their differences.

Reported by Anne Soh